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No. 80-679

Supreme Court, U. S.
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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,
Respondent,

versus

RAPHAEL FELO DELGADO and
JORGE F. BUSTILLO,
Petitioners.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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October ____, 1980

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QUESTIONS PRESENTED

1. Whether the trial court erred in denying petitioners' Motion to Suppress the Evidence where law enforcement agents conducted a warrantless search of a private warehouse in violation of petitioner's right to protection against unreasonable search and seizure guaranteed by the Fourth Amendment of the United States Constitution? See *Payton vs. New York*, ____ U.S. ____, 27 Cr. L. 3033 (April 15, 1980).

2. Whether the trial court erred in denying petitioners' Motion for Judgment of Acquittal based upon insufficiency of evidence?

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

UNITED STATES OF AMERICA,
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versus

RAPHAEL FELO DELGADO and
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PETITION FOR CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioners, RAPHAEL FELO DELGADO and JORGE F. BUSTILLO, through their undersigned counsel, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, rendered in this proceeding on April 9, 1980.

OPINIONS BELOW

The Judgment of the Court of Appeals for the Fifth Circuit, denying the Petition for Rehearing, appears as Appendix A hereto, pp. 1a-2a.

The opinion of the Court of Appeals for the Fifth Circuit, affirming the conviction and sentence of the petitioners herein, entitled *United States of America vs. Raphael Felo Delgado, et al,* (No. 79-5409, 5th Cir., 1980) appears as Appendix B hereto, pp. 2a-8a.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered April 9, 1980. A timely petition for rehearing *en banc* was denied on June 17, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

A. Statement Of Facts

In December of 1978, Drug Enforcement Administration (DEA) agents received information that a group of individuals were involved in smuggling marijuana into New Orleans from South America and that they could be found at a residence on Elysian Fields Avenue in New Orleans. The location was placed under surveillance.

On the night of January 15, 1979, DEA and customs officials observed several individuals at a marina unloading bales from a yellow boat, previously observed at the above residence, into a silver pick-up truck. The truck then proceeded to a private warehouse on Paris Road, New Orleans, where the bales were unloaded. This procedure was repeated twice that night. No search warrant was obtained during this time, although Agent Woodrow Wilson, the chief investigating officer, admitted that he discussed with other offi-

cials whether or not to obtain a search warrant. (Tr. 29-30). As the silver pick-up exited the warehouse for the last time, it turned away from the previous loading site. The officers stopped it and arrested the three occupants. On the pretext of searching for other suspects, the private warehouse was then entered by law enforcement agents without either arrest or search warrants. Although no one was found within the private warehouse, the relevant evidence herein, marijuana, was seized.

SIGNIFICANTLY, the first delivery to the private warehouse occurred at approximately 10:40 p.m. and the above arrests were not made until 3:15 a.m., approximately 4½ hours later.

The petitioners herein, Delgado and Bustillo, were arrested as they were driving a red pick-up truck some two miles from the marina where the yellow boat was originally observed. Allegedly, a truck matching the description of the petitioners' truck was seen departing the marina, but the testimony revealed that this surveillance was broken. The petitioners were arrested miles from where the surveillance was broken, as they proceeded on a different highway. According to DEA agent McCoy, the petitioners were wet, had gleanings of marijuana on their clothing, and smelled of marijuana when arrested.

B. Course Of Proceedings And Disposition Below

Petitioners and four other defendants were indicted on January 25, 1979 in a two count indictment with: Count 1 — conspiracy to possess with intent to distribute and to distribute marijuana; Count 2 — possession with intent to distribute the same marijuana as in Count 1, (R. 1-2).

On June 4, 1979, it was agreed that the case would be tried to the court without a jury and that the evidence on the Motion to Suppress would be submitted to the court for the trial on the merits. On June 12, 1979, the trial court denied the Motion to Suppress stating that no search warrant was necessary because the seizures were made pursuant to valid arrests. The court specifically rejected the plain view doctrine as being a "legal pigeon hole". (Tr. 301-302). The evidence presented in the Motion to suppress was submitted to the court for the trial on the merits. (R. 310). Petitioners herein moved for a judgment of acquittal. (R. 311). The court denied the motion. After the petitioners rested, the court found each of the six defendants guilty as charged on both counts.

The United States Court of Appeals for the Fifth Circuit affirmed the conviction and sentence of the petitioners finding that: (1) the warrantless search of the private warehouse herein was proper where officers entered the warehouse on the pretext of arresting

additional suspects, and (2) that the evidence sufficiently connected the petitioners with the crimes charged.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

1. The warrantless entry of law enforcement agents into a private warehouse on the pretext of arresting unknown and, ultimately, non-existent suspects, but which resulted in the seizure of evidence, i.e., marijuana, violated the petitioners' Fourth Amendment Rights as guaranteed by the United States Constitution.

The United States Court of Appeals for the Fifth Circuit, in its opinion below, held that the evidence herein, i.e., marijuana, was legally seized because (1) the agents entered the private warehouse to arrest suspects (and not seize marijuana) and (2) once in the private warehouse, the agents seized the evidence pursuant to the "plain view doctrine".

The "plain view doctrine" holds that "objects falling in the plain view of an officer *who has a right to be in the position to have that view* (emphasis added) are subject to seizure and may be introduced in evidence." *Harris vs. United States*, 390 U.S. 234 (1968).

Petitioners respectfully submit that the officers herein did not have the right to be in the private ware-

house in order to view and seize the evidence introduced at trial. Accordingly, that evidence should be suppressed.

This Court, in the recent decision of *Payton vs. New York*, ____U.S. ____, 27 Cr. L. 3033 (April 15, 1980) held that in order to justify an entry of a residence for the purpose of effecting an arrest there must be: (1) probable cause to arrest, (2) cause to believe the person sought to be arrested is on the premises, and (3) exigent circumstances. In reaching its conclusion about residences, the Court distinguished *U.S. vs. Watson*, 423 U.S. 411 (1976) upholding warrantless arrests in public places. However, the law of *Payton* is applicable to the present case. The private warehouse herein is not a public place. The expectation of privacy therein, if not as great, is clearly nearer the expectation one would have for his possessions stored at home than that expected in an area where the public is invited. Absent some exigent circumstances there is no right of the Government to make a warrantless entry upon the premises of a business establishment not open to the public to perfect an arrest. See *U.S. vs. Phillips*, 497 F.2d 1131 (9th Cir., 1974).

Given the applicability of *Payton* to the present case, there is no doubt that the instant entry into the private warehouse to effect arrests of unknown and nonexistent suspects was illegal. There was no cause to believe that there were any suspects in the warehouse

and, even if those suspects did exist, there were no exigent circumstances to justify the intrusive entry.

There is no evidence or testimony in the record to support the contention that the officers had "reasonable grounds" to believe that anyone remained in the warehouse. The door to the warehouse had been closed by the three men who left in the silver pick-up truck. The rear of the warehouse (where all the activity had taken place) had been left in total darkness. (Tr. 227). No sign of movement or activity was noticed inside the warehouse by the two officers assigned to keep this area under surveillance To the contrary, these officers left the rear of the warehouse *completely unattended* and went to where the arrest was taking place some distance to the front of the warehouse. Had these officers had any indication of the continued activity in the rear of the warehouse after the departure of the pick-up truck, they would never have left their assigned position. There is no testimony from these officers or any other officers of the slightest movement or activity once the pick-up truck leaves the scene. No one was found in the warehouse. Additionally, these two officers who left the rear of the warehouse were not summoned to assist in the arrest. There were certainly sufficient officers at the front of the warehouse to secure the arrest of any other individuals.

After the agents had arrested the three men in the silver pick-up truck they had accounted for at least nine

persons who had been seen on the night in question. The best estimates of the total number of individuals seen at the landing site was seven. Upon their arrival back at the rear of the warehouse no law enforcement officer made any call whatsoever for anyone in the warehouse to come out and surrender himself. This lack of even a single announcement is shown in the testimony of Officer Fuller who opened the door to the warehouse. (Tr. 176-177). Although the use of the canine is now portrayed as a safety precaution, the procedure used does not substantiate this allegation. Instead of announcing the dog and giving any individual a chance to surrender, no announcement was made, as previously mentioned. The dog was not sent in alone, which is the method used to protect the lives of officers. One officer and maybe more accompanied the dog into the warehouse. (Tr. 106). Officers also tried the front door and the side door before opening the rear door. (Tr. 114). By their actions, they obviously intended to enter the premises with no apparent concern for safety since the dog was not present at those entry points.

The surveillance lasted over four and one-half hours. There were so many agents, custom officers and sheriff's deputies on the scene that no accurate number is given. A minimum of fifteen officers were present. (Tr. 129).

In spite of an abundance of time, four and one-half hours, an excess of manpower, previous knowledge of

the location and description of the warehouse, a series of deliveries to this warehouse, and no apparent danger whatsoever of anyone escaping or destroying the contraband, a warrant was never even sought.

There were no exigent circumstances. The difficulties of getting warrants signed is mentioned by both the federal authorities (Tr. 125) and the St. Bernard Sheriff Deputies (Tr. 204-205). However, these difficulties are not particular ones encountered in this instance but general problems from previous situations. The problems, it turns out, were all apprehensions rather than realities. Not even a single phone call was made to any federal or state judge or magistrate to see if they were available. (Tr. 225-226). It is obvious that it was more convenient for the officers to radio for a canine unit than to follow constitutional requirements and get a valid search warrant. Additionally, the DEA Report of Investigation (Defense Exhibit 1) page 4 states as follows:

> ". . . utilizing Customs Search Authority and under the direction of Customs Patrol Officers, DEA Agents and St. Bernard Sheriff's Officers entered the warehouse and searched the warehouse."

No mention is made in the DEA Report of any reason whatsoever for the agents to have expected additional individuals in the warehouse. It is obvious from the

facts that the officers felt it burdensome to obtain a search warrant. Instead, what was first labeled a "customs search" by the officers (Defense Exhibit 1) became a search for non-existent suspects.

In summary, the law enforcement agents herein had no legal grounds to enter the private warehouse, as the record clearly demonstrates that: (1) there was no cause to believe that there were any suspects in the warehouse, and (2) even if such suspects existed, there were no exigent circumstances to justify the intrusive entry. The entry into the private warehouse was illegal. All evidence seized in the private warehouse should be suppressed as violative of the petitioners' rights under the Fourth Amendment of the United States Constitution.

The violation of the petitioners' Fourth Amendment rights justifies the grant of certiorari to review the judgment below.

2. The trial court erred in denying petitioners' Motion for Judgment of Acquittal based upon insufficiency of evidence.

As admitted by the Government, the evidence in this case against the petitioners was, at best, circumstantial. See Brief for the United States, p. 43, *U.S. vs. Delgado*, supra. On a motion for a judgment of acquittal, the test is whether, taking the views most favorable to the Government, a reasonably minded jury

could accept relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. *United States vs. Warner*, 441 F.2d 821 (5th Cir., 1971), cert. denied 404 U.S. 829 (1971); *Glasser vs. United States*, 315 U.S. 60 (1942).

The standard to be applied by a trial judge in testing the sufficiency of the evidence is whether a reasonable minded jury must necessarily entertain a reasonable doubt about the evidence. *United States vs. Bright*, 550 F.2d 240 (5th Cir., 1977); *United States vs. Higgins*, 545 F.2d 1009 (5th Cir., 1977).

Petitioners, Delgado and Bustillo, were arrested several miles from the private warehouse. They were never identified on the boat or in the marina. A car and a trailer matching their description was seen leaving the marina. However, surveillance was not continuous. Moreover, the petitioners were arrested as they proceeded on a different highway miles from where the surveillance was conducted. An agent testified that they were wet and had marijuana gleanings on their clothes.

Suspicious circumstances are not a substitute for evidence of guilt beyond a reasonable doubt. The evidence herein was insufficient to establish that the petitioners were involved in a conspiracy with intent to distribute marijuana.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition has been served upon counsel for respondent, John Volz, United States Attorney, Eastern District of Louisiana, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana 70130, and that three (3) copies have been served upon Wade H. McCree, Solicitor General, Department of Justice, Washington, D.C. 20530 by placing said copies in the United States mails, postage prepaid.

I further certify that all parties required to be served have been served.

This ____ day of October, 1980.

RAUL BENCOMO

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5409

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RAPHEL FELO DELGADO, JORGE F. BUSTILLO,
JOSE GUEVARA, RUGELIO SILVA,
SILVIO CASTRO and JESUS A. HERNANDEZ,
Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING

June 17, 1980

Before RONEY, KRAVITCH and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Appellants DELGADO and BUSTILLO, in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
Paul H. Roney
United States Circuit Judge

APPENDIX B

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

Raphel Felo DELGADO, Jorge F. Bustillo,
Jose Guevara, Rugelio Silva,
Silvio Castro and Jesus A. Hernandez,
Defendants-Appellants.

No. 79-5409
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 9, 1980.

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* Fed.R.App.P. 34(a); 5th Cir. R. 18.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before RONEY, KRAVITCH and TATE, Circuit Judges.

PER CURIAM:

Defendants were convicted of possession of marijuana with intent to distribute and conspiracy, 21 U.S.C.A. §§841(a)(1), 846. Their major contention on appeal is that evidence of the warrantless seizure of several thousand pounds of marijuana was wrongfully admitted. Some defendants contend there was insufficient evidence to sustain their convictions. Finding these arguments to be without merit, we affirm the convictions.

A sketchy review of the facts is sufficient to set the scene for the search and seizure issue. In December 1978, Drug Enforcement Administration (DEA) officers received information from a confidential informant that a group of people would be importing 50,000 pounds of marijuana into New Orleans from South America, and they could be found at a residence on Elysian Fields Avenue in New Orleans. The location was placed under surveillance by both Customs agents and agents of the DEA.

On the night of January 15, 1979, DEA and Customs officials saw a yellow boat, previously observed at

the residence, returning from the Mississippi River Gulf Outlet, which is directly connected to the Gulf of Mexico. The boat was heavily laden and riding low in the water. The boat pulled into a marina where several vehicles that had also been observed at the residence were parked. These vehicles included a silver pick-up with a camper top and a red pick-up pulling a boat trailer. A number of people were observed off-loading bales of what appeared to be marijuana from the boat into the silver pick-up truck. The truck then proceeded to a warehouse on Paris Road, where the bales were unloaded. This procedure was repeated two more times that night. Another rental van was also observed leaving the warehouse. As the door was opened to allow these trucks in and out, one of the Customs officers was able to see several bales of marijuana inside the well-lighted warehouse.

After the last load, several officers met to discuss strategy, leaving Customs officers to watch the warehouse and marina. Before they could agree on a plan, the Customs officers at the warehouse reported the silver pick-up was leaving. The Customs officers and the others stopped the vehicle less than 100 yards from the warehouse, and the occupants, defendants Hernandez, Guevara and Silva, were arrested. Because of the noise of the arrest and the presence of a CB radio in the truck, and because the warehouse had been left unwatched during the arrest, the officers ran back to the warehouse to prevent the escape of other suspects they believed were still inside. Small lights in the office area

were on but the building was otherwise dark. The rear door, through which the pick-up had driven, was open slightly at the bottom. After the building was surrounded, one of the Customs officers opened the door and a police dog and its handler were sent in to search for other suspects. None were found but the bales of marijuana in the warehouse were seized.

The district court correctly held the evidence seized in the warehouse was not the fruit of an illegal search. In *United States v. Diezel*, 608 F.2d 204 (5th Cir. 1979), this Court held that Customs officials have the power, under 26 U.S.C.A. §7606, to make arrests when violations of drug and marijuana laws are committed in their presence or where there are reasonable grounds to suspect a violation. In *Diezel*, Customs agents had received information that an illegal off-loading of marijuana would occur in Key West. The pier was kept under surveillance. Bales were observed being unloaded from a vessel into motor vehicles. The vehicles were stopped and the occupants arrested. When other persons ran into a nearby warehouse, Customs agents followed them there and arrested them. The arrests were held to be legal.

The Customs agents here were authorized to arrest the occupants of the truck leaving the warehouse and to enter the warehouse to arrest other suspects they reasonably believed to be present. A number of people were involved in the operation, in the middle of the night, and a number had gone and come at the ware-

house. The door was partially open. A few lights were on in parts of the building. The fact that suspects were not found does not vitiate the reasonableness of the officers' entry.

Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970), relied on by defendants, is inapposite. That case held that an arrest on the street outside the house does not justify a warrantless search of the house. The entry into the warehouse is not justified on the ground that an arrest was made nearby. The entry was proper because the agents had probable cause to arrest the participants in the operation and reasonable grounds to believe that some of them were in the warehouse.

Having legally entered the warehouse for the purpose of apprehending additional suspects, the Customs officers could seize the bales of marijuana that were then in plain view.

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.

Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968).

Defendants argue that since the agents knew marijuana was in the warehouse, it was not discovered in-

advertently and therefore may not come in under the plain view doctrine, citing *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1970). The "inadvertent discovery" requirement in *Coolidge* does not prohibit the admission of the evidence here. *Coolidge* was "not a case involving contraband or stolen goods or objects dangerous in themselves." *Id.* at 472, 91 S.Ct. at 2041. The seizure here was of contraband. The *Coolidge* opinion cites *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963), as the proper test for determining the validity of the seizure of contraband. The Court held in *Ker* that, while an arrest may not be used merely as a pretext for a search without a warrant, the seizure of marijuana in plain view is proper when the entry is based on constitutionally permissible grounds and when the purpose for the entry is to arrest the suspect. *Id.* at 42-43, 83 S.Ct. at 1634-1635. Here the district court specifically found that the officers entered the warehouse to arrest additional suspects and not to search for and seize the marijuana.

Our cases fully support the refusal to suppress evidence of contraband under such circumstances. *United States v. Worthington*, 544 F.2d 1275, 1280 (5th Cir.), *cert. denied*, 434 U.S. 817, 98 S.Ct. 55, 54 L.Ed.2d 72 (1977); *United States v. Cushnie*, 488 F.2d 81 (5th Cir. 1973), *cert. denied*, 419 U.S. 968, 95 S.Ct. 233, 42 L.Ed.2d 184 (1974). *See also United States v. Bolts*, 558 F.2d 316 (5th Cir.), *cert. denied sub nom. Hicks v. United States*, 434 U.S. 930, 98 S.Ct. 417, 54 L.Ed.2d 290 (1977).

Delgado and Bustillo argue there was insufficient evidence to connect them with the conspiracy. After the third load, the boat was observed by a surveillance aircraft and Customs agents at the marina to make one more run to the area where a 65-foot shrimper was seized the next day. Shortly after the boat returned to the marina, the red pick-up with a boat trailer attached was seen driving away. It was followed, stopped, and its occupants, defendants Delgado and Bustillo, were arrested. At the time of their arrest they were wet and had gleanings of marijuana on their clothing and they smelled of marijuana. Evidence of such activity in a remote area in the middle of the night is clearly sufficient to support the verdict of the district court as to Delgado and Bustillo.

AFFIRMED.